91-179

Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

ROBERT B. ENRIGHT, JR.,

Petitioner,

v.

CALIFORNIA STATE UNIVERSITY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Johnson v. Transportation Agency, 480 U.S. 616, 631 (1987) holds that an employer may consider sex in the employment process notwithstanding Title VII of the Civil Rights Act of 1964 if that consideration is given pursuant to an affirmative action plan adopted to correct a "manifest imbalance" in a "traditionally segregated" job category. This case raises the following questions regarding the application of that holding:

1. Is the fact that only two members of a nine member job category were women sufficient to demonstrate that there was a "manifest imbalance" under *Johnson* when the employer agrees that the balance would have been ideal if there had been three? Can a deviation of only one employee from an affirmative action goal figure ever be a manifest imbalance? Are the foregoing questions always questions of law, or, depending upon the circumstances, may they sometimes be questions of fact?

2. Can an employer rely on an affirmative action plan to justify its consideration of sex in the employment process when it deviates materially from its prescribed personnel procedures which are used to implement that affirmative action plan?

LIST OF PARTIES

The caption of this case contains the names of all the parties, Respondent California State University is an agency of the State of California and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert B. Enright, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on April 26, 1991.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit has not been reported. It is reproduced in the appendix hereto, page 1, *infra*.

The memorandum decision of the United States District Court for the Eastern District of California (the Honorable Milton S. Schwartz, District Judge, presiding) has not been reported. It is reproduced in the appendix hereto, page 5, *infra*.

JURISDICTION

This is a reverse discrimination case brought by petitioner under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. The District Court for the Eastern District of California had jurisdiction under 42 U.S.C. §2000e-5(f)(3). On October 16, 1989, the District Court granted respondent's motion for summary judgment and denied petitioner's cross-motion for summary judgment on the issue of liability. See the appendix hereto, page 6, *infra*. The Court of Appeals for the Ninth Circuit affirmed

on April 26, 1991. See the appendix hereto, page 1, *infra*. No petition for rehearing was filed, but petitioner filed a suggestion that the case be reheard in banc on May 12, 1991. The suggestion was denied on July 3, 1991. On June 25, 1991, respondent filed a letter request for publication of the Ninth Circuit's memorandum decision on the ground that the decision "analyzes an issue of unique interest and substantial public importance."

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1)

STATUTE INVOLVED

42 U.S.C. §2000e-2 *Unlawful Employment Practices*

(a) It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Section 2000e-2, set forth above, makes it unlawful for an employer to fail to hire any individual because of sex. Petitioner, Robert B. Enright, Jr., was ranked as the best candidate for an assistant professorship in sociology at California State University, Chico, but his appointment

was blocked because, as the District Court found, sex was made a factor in the employment process. See the appendix hereto, page 10, *infra*.

The legal principle that controls this case is set forth in *Johnson v. Transportation Agency*, 480 U.S. 616, 630-632 (1987), which holds that an employer may justify consideration of sex in the employment process where there is a manifest imbalance in a traditionally segregated job category and the consideration of sex is in accordance with a valid affirmative action plan. This case raises the following issues relating to the application of that holding:

1. Is the fact that only two members of a nine member job category were women sufficient to demonstrate that there was a "manifest imbalance" under the *Johnson* holding when the employer agrees that the balance would have been ideal if there had been three? Can a deviation of only one employee from an affirmative action goal figure ever be a manifest imbalance? Are the foregoing questions always questions of law, or, depending upon the circumstances, may they sometimes be questions of fact?

2. Can an employer rely on an affirmative action plan to justify its consideration of sex in the employment process when it deviates materially from its prescribed personnel procedures which are used to implement its affirmative action plan?

The facts relating to these two issues will be set forth separately.

A. The Facts Relating to the "Manifest Imbalance" Issue.

On January 1, 1984, respondent California State University began a national search for an assistant professor

in sociology. (District Court Clerk's records, hereinafter "CR," 28, page 3:25-27.) At that time the University had an affirmative action plan in effect. (CR 23, Exhibit A.) Under that plan the full-time all year tenured and probationary faculty in each department was considered a separate job category for affirmative action purposes. One of the purposes of the affirmative action plan was to determine whether women and minorities were "underutilized" in each of the various job categories. This was done by comparing the proportion of women and minorities in each job category with the proportion of women and minorities believed to be available to fill positions in that job category. (CR 23, Exhibit A, Guidelines section, pages 3-4.)

In the spring of 1984, when the University made the selection that gave rise to this action, there were nine full-time all year tenured and probationary faculty members in the Sociology Department. (CR 42, page 1:22-25.) Two of those were women. (CR 35, page 2:1-3.) The University computed the Sociology Department female availability ratio by comparing the number of women who had received Ph.D.s in Sociology nationwide during the years 1975 through 1980 (1,387) to the total number of those who received Ph.D.s during that period (3,983). That ratio was therefore computed to be 34%. (CR 21, page 2:20-26.) Thus, according to the University's affirmative action plan, women would have been properly utilized by the Sociology Department if three of its faculty members, rather than two, had been women.

Based on these figures, the University contends that there was a "manifest imbalance" in the number of women on the Sociology Department as the quoted term

is used in *Johnson v. Transportation Agency*, 480 U.S. 616 630-632 (1987), and that it was therefore entitled to take sex into consideration in the hiring process notwithstanding the provisions of the Civil Rights Act of 1964.

Two other facts relating to the "manifest imbalance" issue should be noted: *First*, the 34% figure incorporated in the University's affirmative action plan obviously cannot be considered a precise measure of the availability of qualified female sociologists willing to locate in Chico in 1984 since all it represents is the proportion of women nationwide who received Ph.D.s during the years 1975 through 1980. *Second*, although the University made a nationwide search during the employment process that gave rise to this action (CR 28, page 3:25-27), it located only twelve qualified candidates interested in the position, three of whom (25%) were women. (CR 28, page 4:9-19). Twenty-five percent of nine is closer to two than to three.

The Ninth Circuit disposed of the "manifest imbalance" issue by stating in its Memorandum Decision that "the University has shown a statistical imbalance between its work force and the applicable work force. Accordingly, the manifest imbalance requirement has been satisfied." Appendix, page 2, *infra*.

B. The Facts Relating to the "Material Deviations From the Plan" Issue.

1. The Affirmative Action Plan and the Faculty Personnel Policies and Procedures.

The University's Affirmative Action Plan appears in the record as CR 23, Exhibit A. It provides, in pertinent part, that

> " . . . the University has committed itself to . . . a policy whereby protected class members will be selected . . . in those instances where they have been adjudged substantially equal in qualifications to none-protected members."

A closely related document, the University's Faculty Personnel Policies and Procedures, also contains affirmative action provisions and sets forth the detailed procedures to be followed when making appointments pursuant to the Affirmative Action Plan. (CR 29, attachment to respondent's answers to petitioner's first interrogatories, hereinafter cited as CR 29-FPPP.)

Section 13.13 of the University's Faculty Personnel Policies and Procedures reads in pertinent part as follows:

> " . . . this School [Affirmative Action] Committee shall review the appointment recommendation and all accompanying documents and memoranda and forward them to the School Dean. It may attach to the intent-to-hire document its own commentary on the status of intent with respect to affirmative action considerations, *but not with respect to candidate professional qualifications.*" (CR 29-FPPP, page 15, emphasis added.)

Section 13.16 of the Policies and Procedures reads as follows:

> "Agreement by the Department/Unit and the School Dean on a candidate to whom an offer should be extended will ordinarily be sustained by the Vice President for Academic Affairs. *Should the Vice President disagree, he/she will meet with the Department/Unit personnel committee and the School Dean to explain the basis for disagreement.* If these differences cannot be resolved, the

appointment decision will be sent back to the Department/Unit personnel committee and new candidates will be sought."

(CR 29-FPPP, page 16, emphasis added.)

2. The Improper Comments on Professional Qualifications by One of the University's Affirmative Action Officials.

On May 30, 1984, after interviewing three of the twelve candidates who satisfied its minimum requirements, the Sociology Hiring Committee ranked petitioner first, followed by a female candidate and another male. (CR 28, page 6:14-26.) The female candidate was not initially ranked among the top three candidates but was interviewed because of affirmative action considerations. (CR 28, page 5:14-25.) On May 31, 1984, the Committee sent an "intent to appoint" form to the School of Behavioral and Social Sciences ranking the candidates and stating that it was the Committee's "consensus that Dr. Enright was the best qualified candidate for the position." (CR 28, pages 6-7.)

In June of 1984, Dr. Margaret Bierly, Chair of the School of Behavioral Sciences Affirmative Action Committee, wrote two memoranda to University officials containing detailed comparisons of the professional qualifications of the candidates and urging that the female candidate be appointed. (CR 28, pages 7-8.) These memoranda were a direct violation of Section 13.12 of the Faculty Personnel Policies and Procedures set forth above. It is clear that the memoranda caused petitioner to lose the offer of the position since Dr. Gerald R. Stairs, the University's Vice President for Academic Affairs, who

blocked petitioner's appointment, testified that it was his practice to review the process used by a department in reaching a recommendation on an appointment " . . . [w]henever I am aware that the affirmative action committee or the university affirmative action officer is questioning a proposed hire." (CR 23, page 3:8-16.)

3. The Failure of the University's Vice President to Meet with the Sociology Department Hiring Committee to Explain the Basis for his Disagreement with the Committee's Recommendation.

After deciding that he would not approve the Department's recommendation to offer petitioner the position, Dr. Stairs did not meet with the Department Hiring Committee to try to resolve the matter as required by section 13.16 of the Faculty Personnel Policies and Procedures. Instead, he advised the School Dean that he would not "at that time approve the recommendation to hire Dr. Enright" and asked the Dean "to discuss the matter with the Departmental Hiring Committee and to request that the committee reconsider the candidacy of Grace Marvin [the female candidate]" (CR 28, page 9:8-16.) However, presumably due to a misunderstanding, when the message was passed to the Department Chair and then to the Department Hiring Committee, the Committee was told "that in effect we were not going to get approval over to Enright." (CR 28, page 10:20-23.) The Committee, including its chair, who described herself as a "feminist," (CR 37, page 14) was "outraged" and "angry" that its "collective judgment, professional decision was not being followed." (CR 28, page 10:24-27.) However, its "decision then was, given our need, to offer to Marvin."

(CR 28, pages 10-11.) The Sociology Department "didn't like the gun to the head" but was "not willing . . . to lose a position altogether." (CR 28, page 11:1-4.) It therefore agreed to offer the position to Grace Marvin.

It seems clear that the Vice President's failure to meet with the Department Hiring Committee, as he was required to by Section 13.16, was a material departure from the procedures that were used to implement the University's affirmative action plan. Face-to-face interchange can be important, particularly when a professionally qualified group of advocates feels as strongly as the record shows the Sociology Department Hiring Committee did. We are entitled to assume that the Vice President was a responsible and reasonable public official who was open to persuasion.

4. The Ninth Circuit Decision.

The Ninth Circuit disposed of the "material deviations" issue by stating that, "[a]lthough certain communications between the hiring committee, the affirmative action committee, and the vice president were inconsistent with prescribed personnel procedures, these deviations did not violate the University's affirmative action plan." Appendix, page 3, *infra*. Thus the Ninth Circuit's holding appears to be that an employer can fail to hire an employee because of sex and assert the existence of an affirmative action plan as a defense even when it does not follow its prescribed procedures which are used to implement that plan.

REASONS FOR GRANTING THE WRIT

The writ should be granted because Ninth Circuit has, in this action, decided two important questions of federal law that have not been, but should be, settled by this Court. Both questions involve the application of this Court's holding in *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987), that an employer may consider sex in the employment process notwithstanding Title VII of the Civil Rights Act of 1964 if it is done pursuant to an affirmative action plan adopted to correct a "manifest imbalance" in a traditionally segregated job category.

The importance of each of the two questions will be discussed separately. However, both involve the ground rules that must be followed when an employer elects to make sex or race a factor in the employment process. Few questions are more important to the courts or to the general public today than the establishment of those ground rules. Each of the two questions raises issues that have not been settled by this Court.

I.

The Ninth Circuit's Holding that an Employer may make Sex a Factor in the Employment Process Merely Because the Number of Women in a Job Category is one less than an Affirmative Action "goal figure" is of Nationwide Importance. Moreover, it is Inconsistent with this Court's Holding in *Johnson* that Sex may be Considered only when a Male-Female Imbalance is "Manifest."

This Court held in *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987) that sex may be considered in

employment decisions pursuant to an affirmative action plan adopted to correct a "manifest imbalance" in a traditionally segregated job category. No reported cases have considered the application of the "manifest imbalance" criterion to extremely small "imbalances" or to small job categories. In *Johnson*, none of the 238 skilled craft worker positions that constituted the job category relevant to the case was held by a woman. *Id.* at 621. In *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989), the record showed that "in the history of the fire department only three blacks, one of whom was Cooley, have ever held the position of firefighter/engineer."

It seems clear that the question as to how the "manifest imbalance" criterion applies to extremely small "imbalances" or to small job categories is of exceptional importance since employers nationwide, public and private, have affirmative action plans with hiring goals for women and minorities. Questions as to whether and how those plans can be applied, and sex and race considered in employment decisions, where deviations from a "goal" figure are relatively slight must arise frequently. These questions will arise even more frequently in the future as the historical imbalances in traditionally segregated job categories diminish.

The question as to what constitutes a "manifest imbalance" is important, and its resolution is significant, without reference to precisely how the question should be resolved. However, it is clear that the Ninth Circuit's answer to the question was incorrect. The Ninth Circuit's holding that a deviation of one employee from a "goal" figure constituted a manifest imbalance is inconsistent

with this Court's disapproving references in *Johnson* to "blind hiring by the numbers" and "reflexive adherence to a numerical standard." (480 U.S. at 636-637.) Indeed, the effect of the Ninth Circuit's holding is to delete the word "manifest" from this Court's "manifest imbalance" criterion. Petitioner submits that the test for application of the criterion that he has urged is logical and equitable. That test is expressed in the following question: Would an intelligent, fair-minded person, upon being informed of the facts, conclude that the imbalance was such that the "level playing field" mandate of Title VII should be disregarded and sex or race made a factor in the employment process?

There is a subsidiary question raised by the Ninth Circuit's decision that is also of nationwide importance. Is the question as to what constitutes a "manifest imbalance" necessarily one of law or, depending upon the circumstances, may it be a question of fact? As explained above, the Ninth Circuit affirmed the District Court's ruling that respondent was entitled to summary judgment because only two members (22%) of the job category were women whereas the "goal" figure was three (34%). The 34% figure purported to be a "female availability ratio" that was developed by comparing the number of women nationwide who had received Ph.D.s in Sociology during the years 1975 through 1980 (1,387) to the total number of those who had received Ph.D.s during that period (3,983). (CR 21, page 2:20-26.) But was the 34% figure so developed a meaningful measure of the proportion of qualified female candidates willing to relocate to Chico in 1984 who were women? As also

explained above, the University located only twelve minimally qualified candidates, three of whom (25%) were women, when it made a nationwide search. (CR 28, page 4:9-19.) Was the question whether the male-female "imbalance" was "manifest" perhaps a question of fact to be resolved by considering all of the foregoing matters and possibly additional matters as well?

A decision from this Court that furnishes guidance as to the manner in which the "manifest imbalance" criterion should be applied to extremely small "imbalances" and to small job categories would be of nationwide importance.

II.

The Ninth Circuit's Holding that an Employer may Rely on its Affirmative Action Plan to Justify its Consideration of Sex in the Employment Process when it did not Adhere to the Policies and Procedures Promulgated to Implement that Plan Raises a Question of Nationwide Importance. Moreover, it is Inconsistent with this Court's Holding in its *Johnson* Decision.

Johnson v. Transportation Agency, 480 U.S. 616, 631 (1987), holds that sex may be considered in employment decisions if it is done pursuant to an affirmative action plan meeting certain criteria. Respondent had a set of Policies and Procedures used to implement its affirmative action plan. The Policies and Procedures contained provisions that set forth the functions that affirmative action officials were to play in the employment process and set clear limits on those functions. One of those officials

clearly violated those Policies and Procedures by circulating a memorandum containing a detailed commentary on the professional qualifications of the two leading candidates. The evidence makes it clear that, absent the circulation of that memorandum, petitioner's appointment would not have been blocked.

Another official, the University's Vice President for Academic Affairs, also violated those Policies and Procedures when he failed to meet with the Sociology Department Hiring Committee to attempt to resolve his disagreement with the Committee over its recommendation. The Vice President's failure to meet with the Committee was clearly material. The Committee felt so strongly that petitioner was the best qualified candidate that there was certainly a reasonable possibility that they would have convinced the Vice President that their views were correct.

The Ninth Circuit held that, although the actions of the affirmative action committee and the Vice President "were inconsistent with prescribed personnel procedures, these deviations did not violate the University's affirmative action plan." (Appendix, page 3, *infra*.)

No reported cases consider the extent to which an employer may deviate from its affirmative action plan and still rely on that plan as a justification for considering sex or race in the employment process. The Ninth Circuit's holding that an employer may violate its own affirmative action procedures with impunity provided it labels the procedures it has violated "Procedures" rather than "Plan" seems clearly inconsistent with the philosophy embedded in *Johnson*. A decision from this Court that

furnishes guidance on the extent to which an employer may deviate from the provisions of its affirmative action plan and any closely related documents and still rely on that plan as a justification for considering sex or race in the employment process would be of importance to employers nationwide.

CONCLUSION

Petitioner respectfully submits that, for the above reasons, this petition for certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT B. ENRIGHT, JR., Plaintiff-Appellant,	No. 89-16391
v.	D.C. No. CV-87-1673-S
CALIFORNIA STATE UNIVERSITY,	**MEMORANDUM***
Defendant-Appellee.	FILED APR 26 1991

Appeal from the United States District Court for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted February 12, 1991
San Francisco, California

Before: TANG, SKOPIL, and THOMPSON, Circuit Judges

In this civil rights action, Robert Enright alleges that California State University, Chico refused to hire him because of his sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988). He contends that the University's affirmative action plan is invalid and that, alternatively, because the University failed to follow its own personnel procedures, it is precluded from relying on its affirmative action plan. The

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

district court granted summary judgment for the University, concluding that the University had not engaged in unlawful discrimination. We affirm.

1. Title VII and Affirmative Action Plans

Title VII of the Civil Rights Act of 1964, provides that it "shall be an unlawful employment practice for an employer . . . to fail to refuse to hire . . . any individual . . . because of such individual's . . . sex . . . . " 42 U.S.C. § 2000e-2(a)(1). Nevertheless, an employer may adopt an affirmative action plan provided that "a 'manifest imbalance' exists, reflecting underrepresentation of women and minorities in 'traditionally segregated job categories.' " *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1448 (9th Cir. 1989) (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987)), *cert. denied*, 111 S. Ct. 248 (1990).

Enright contends there was no manifest imbalance in this case because the University attained its affirmative action goal by hiring one woman. We disagree. The University sets its affirmative action goals by comparing "the availability of minorities and women having the requisite skills in an area in which the campus can reasonably recruit." Here, the University has shown a statistical imbalance between its work force and the applicable work force. Accordingly, the manifest imbalance requirement has been satisfied. *See id.*

Enright also contends that the job category at issue was not a "traditionally segregated job category." We reject this contention as well. The University has shown that its hiring practices have resulted in segregation, and

that its plan was adopted to eliminate "the continuing effects of discrimination which has resulted in the limited representation of protected class members in certain occupations." Moreover, the University's plan was used to *attain* rather than to *maintain* its affirmative action goals. The University's adoption and implementation of its plan was therefore lawful. *See Higgins v. City of Vallejo*, 823 F.2d 351, 357 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989).

2. Deviations from Personnel Procedures

Enright complains that the University failed to follow certain personnel procedures when it refused to hire him. We note that "evidence that the employer violated its own affirmative action plan may be relevant to the question of discriminatory intent." *Gonzalez v. Police Dept.*, 901 F.2d 758, 761 (9th Cir. 1990). In this case, however, we agree with the district court that the University's deviations from its established personnel procedures were immaterial. Although certain communications between the hiring committee, the affirmative action committee, and the vice president were inconsistent with prescribed personnel procedures, these deviations did not violate the University's affirmative action plan. The final hiring decision was made by the vice president, who had the ultimate authority for hiring personnel and for enforcing compliance with the affirmative action plan. The plan requires that protected class members "be selected in hiring . . . decisions in those instances where they have been adjudged substantially equal in qualifications to non-protected class members." The vice president stated that the woman candidate "was at least as qualified, if

not better qualified, than Robert Enright." Hiring the woman candidate was consistent with the University's plan.

AFFIRMED.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT B. ENRIGHT, JR., Plaintiff, v. CALIFORNIA STATE UNIVERSITY, Defendant.	No. CIV-S-87-1673 MLS ORDER

Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment came on regularly for hearing before the above-entitled court, the Honorable Milton L. Schwartz presiding, on August 18, 1989. Plaintiff Robert B. Enright, Jr. appeared by counsel, Jesse S. Kaplan; defendant also appeared by counsel, Deputy Attorney General Cathy Christian.

The Court, having considered the documents filed in support of and in opposition to both motions, having heard the arguments of counsel and being fully advised in this matter, announced its disposition of the motion

and its reasons therefor into the record and ordered defendant's counsel to prepare a formal order consistent therewith.

Accordingly, the Court finds as follows:

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Plaintiff's Motion for Partial Summary Judgment is DENIED.

3. The reasons underlying the Court's rulings in this matter are set forth the [sic] in the Reporter's Transcript attached hereto.

DATED: October 16, 1989

IT IS SO ORDERED

/s/ Milton L. Schwartz
JUDGE MILTON L. SCHWARTZ
THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MILTON L. SCHWARTZ, JUDGE

ROBERT B. ENRIGHT, JR., Plaintiff,	)	
vs.	)	CIV. NO. S-87-1673-MLS
CALIFORNIA STATE UNIVERSITY, Defendant.	)	

REPORTER'S TRANSCRIPT

RULINGS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - GRANTED

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT - DENIED

FRIDAY, AUGUST 18, 1989

CSR License No. 2223

DENNIS F. McKINNON
Official Reporter
United States District Court
Sacramento, California

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Official Reporter
United States District Court
Sacramento, California

[p. 3] **SACRAMENTO, CALIFORNIA, FRIDAY, AUGUST 18, 1989**

THE CLERK: Civil S-87-1673, Enright vs. California State University.

MR. KAPLAN: Good morning, Your Honor.

Jess Kaplan appearing for Dr. Robert Enright, who is here in court.

THE COURT: Good morning.

MS. CHRISTIAN: Good morning, Your Honor.

Cathy Christian, Deputy Attorney General, representing California State University, the defendant in this action.

THE COURT: Very well.

(Arguments Not Transcribed)

THE COURT: I do not have time to writ a formal, lengthy decision. I'm going to announce the decision now from the bench and ask that counsel make arrangements with the Court Reporter to get a transcript of what I am about to say and attach it to a very simple order that simply enunciates what the ruling is and then, in effect, says for the reasons and upon the grounds set forth in the transcript attached. That way the Court of Appeals has the exact decision that I rendered. I can afford the time to do it this way much more than I can to write a formal opinion.

The plaintiff in this case sues under Title VII of [p. 4] the Civil Rights Act of 1964, which is 42 U.S.C. Sections 2000(e), et seq, alleging that sex was used impermissibly

as a factor in defendant's hiring decision. It is undisputed that defendant considered the candidate's sex in making its hiring decision.

First, I turn to the Johnson test, which everyone acknowledges is important governing landmark authority. In determining whether sex or race has been used impermissibly in hiring the promotion, the plaintiff must establish a prima facie case that race or sex has been taken into account in an employer's employment decision. Johnson vs. Santa Clara County Transportation Agency, 408 U. S. 616, 1987.

The burden then shifts to the employer to articulate a non-discriminatory rationale for its decision, such as the existence of an affirmative action plan.

If the employer articulates such a plan, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. Those are the key words and the key basis of the test. The burden of proving the invalidity of the affirmative action plan remains on the plaintiff.

All of those legal principles that I have just enunciated come from the Johnson case.

Then I turn to the question of the validity of defendant's affirmative action plan. The plaintiff contends [p. 5] in this case that improper figures were used in obtaining the defendant's statistics, and that it was improper for defendant to activate its affirmative action plan in this case.

With respect to the adequacy of defendant's statistics, defendant primarily relies on the percentage of women

nationwide who received Ph.D's in sociology between the years 1975 and 1980 in order to determine the percentage of qualified women in the relevant labor market who were available to fill the tenure-track position in its sociology department.

The Court finds that the thirty-four percent availability figure defendant obtained is rational and appropriate because a Ph.D was required for this job, defendant recruited nationwide, and recent Ph.D recipients are those most likely to seek and to fill entry-level, tenure-track positions.

The next question that has to be addressed is whether or not this is a traditionally segregated job category.

Plaintiff asserts that tenure-track positions in sociology departments are not a traditionally segregated job category.

This Court concludes that when approximately fifty percent of the nation's population is women and only thirty- [p. 6] four percent of the recipients of Ph.D's in sociology are women, sociology must be considered to be a traditionally segregated field. Because only eighteen and twenty-two percent, depending upon whose figures you use, of defendant's full-time permanent sociology faculty was women, the job category has to be considered, at least by me, as a traditionally segregated one at defendant's campus.

That takes us to the doctrine of manifest imbalance. This Court has also concluded that the difference between the percentage of women defendant employed

in this job category and the percentage of women generally available to fill the position constituted a manifest imbalance in the job category. I am referring again to Johnson at Notes 10 and 11, Pages 1452 and 1453.

In order to be valid, an affirmative action plan cannot trammel the rights of male or non-minority employees or create an absolute bar to their advancement. Again from Johnson, and also citing Higgins vs. City of Vallejo, 823 Federal Second 351, Ninth Circuit, certiorari denied by the Supreme Court in 1989.

Relying on the criteria set forth in Higgins, the Court finds that defendant's affirmative action plan did not trammel the rights of non-minorities for the following reasons:

First, with respect to quotas, there is no [p. 7] indication defendant's affirmative action plan relied on rigid quotas or discriminatory exclusions.

B: With respect to expectation or entitlement, final hiring authority rested with defendant's vice president and provost, Dr. Stairs, who was also charged with ultimate authority for seeing that defendant's affirmative action goals were attained. Therefore, plaintiff did not have an absolute entitlement or legitimate expectation of receiving the job, even though he was the candidate initially recommended by the sociology department's hiring committee.

The next criterion to look at is displacement. Plaintiff was not displaced by the hiring of the affirmative action candidate. He had no job at the time, and he retained his

eligibility to apply for another job if one should open in the future.

The final criterion, whether it was a temporary plan, plaintiff has provided no evidence that defendant's affirmative action plan attempts to do anything other than eliminate an imbalance in its workforce.

Based on the foregoing, defendant has borne its burden of establishing that there is no triable issue of fact with respect to the validity of its affirmative action plan and the plan's use. I am referring, of course, to Federal Rule of Civil Procedure 56(c); and also Neely vs. St. Paul Fire & Marine Insurance Company, 584 Federal Second 341, [p. 8] Ninth Circuit, 1978. The Court concludes that plaintiff has failed to set forth specific facts showing that a genuine issue of fact remains for trial under the provisions of Rule 56(e).

Similarly, the Court concludes that plaintiff has failed to make an initial showing that there is no triable issue of fact with respect to the invalidity of defendant's affirmative action plan.

The next issue is whether or not defendant used and followed faithfully its own affirmative action plan. Plaintiff contends that defendant did not actually use the affirmative action plan it devised because there were material deviations from the plan and from defendant's personnel policies and procedures for hiring faculty.

Plaintiff suggests that if Dr. Bierly had not made comments on the candidates' qualifications, which was not permitted by defendant's personnel policies and procedures, he would have been offered the job.

The Court has reviewed defendant's written policies and procedures and has found that refusal by the administrative action committee to approve a hiring committee's recommendation triggers defendant's dispute resolution procedure and review of the committee's recommendations.

Because review would have occurred regardless of [p. 9] whether Dr. Bierly commented on candidates' qualifications, the Court finds that the comments do not constitute a material procedural deviation.

With respect to the argument that there was a failure to meet with the hiring committee, the fact is that the undisputed evidence indicates Dr. Stairs met with Dean Haehn to discuss his disagreement with the recommendation of the hiring committee. He also had the benefit of the hiring committee's written comments regarding the candidates. Furthermore, Dr. Stairs did not refuse to approve hiring plaintiff, merely asked the hiring committee to reconsider the candidacy of Dr. Marvin.

Therefore, the Court finds that the deviation from Paragraph 13.16 of defendant's personnel policies and procedures was not material or substantial.

Third, reevaluation of candidates' qualifications. The Court was unable to find any passage in defendant's personnel policies and procedures or in its affirmative action plan that prohibited Dr. Stairs from evaluating the qualifications of candidates for full-time permanent faculty positions.

Based on the foregoing, the Court finds that deviations from defendant's procedures, which have been cited

by plaintiff, were not material. As a consequence, the Court is impelled to conclude that defendant relied on its [p. 10] affirmative action plan in making its hiring decision.

Because defendant relied on a valid affirmative action plan in making its hiring decision, plaintiff has failed to establish a genuine issue of fact regarding the existence of an element essential to its case. Citing from Celotex Corporation vs. Catrett, 477 U. S. 317, Supreme Court, 1986. As a consequence, the Court grants defendant's motion for summary judgment.

Conversely and for the reverse reasons, the Court has concluded that plaintiff has failed to establish that there is no triable issue of fact with respect to what it contends to be defendant's liability under Title VII. Therefore, the Court denies plaintiff's motion for partial summary judgment.

Will you arrange with the Court Reporter, Ms. Christian, to obtain a transcript of what I have just said and attach it to a brief order granting the motion.

MS. CHRISTIAN: Yes, Your Honor. Thank you.

MR. KAPLAN: Thank you, Your Honor.

THE COURT: All right.

(WHEREUPON, the proceedings in the foregoing matter were concluded.)

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[p. 11] **CERTIFICATE OF REPORTER**

I, DENNIS F. McKINNON, Official Reporter, certify that the foregoing 10 pages constitute a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

Dated: September 11, 1989

/s/ Dennis F. McKinnon
DENNIS F. McKINNON, CSR 2223

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Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

No. 91-179

In The

Supreme Court of the United States

October Term, 1991

ROBERT B. ENRIGHT, JR.,

Petitioner,

v.

CALIFORNIA STATE UNIVERSITY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did respondent California State University properly rely on its affirmative action plan when making the decision to hire a fully qualified female applicant instead of petitioner?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, California State University, hereby submits opposition to the petition for a writ of certiorari, which seeks review of the decision of the Court of Appeals for the Ninth Circuit, entered on April 26, 1991.

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioner Robert B. Enright, Jr. (hereinafter "Enright") was first hired by the Chico campus of the California State University (hereinafter "the University") for the academic year 1979-80. He was hired as a temporary Visiting Assistant Professor of Sociology in the College of Behavioral and Social Sciences ("College"). The employment contract which the University offered Enright was for one year only. (District Court Clerk's Record, hereinafter, "CR": 24, pp. 26-27.) Enright was also hired for the following three consecutive academic years (1980-81, 1981-82 and 1982-83) in the same temporary position, and each year he was given a one-year contract. (*Id.* at 30-34, 40.) The University did not hire Enright for the 1983-84 academic year; another candidate was hired as a Visiting Assistant Professor to teach the courses which Enright had previously taught. (*Id.* at 40.)

In 1984, a "tenure-track" position became available in the University's Sociology Department. A "tenure-track" position is a probationary position from which a successful candidate may ultimately be offered tenure and a permanent position. (*Id.* at 30-33.) A nationwide search

was launched in the Spring of 1984 to fill this "tenure-track" position. A hiring committee, composed of the tenured faculty in the Sociology Department, screened the written applications and created a "finalist's list" of 12 candidates who met the job specifications for the particular position. (CR: 20.)

The hiring committee next chose three candidates for personal interviews. The three candidates, including Enright, consisted of two white males and a black female. Pursuant to the hiring procedures utilized by the University, these three choices were approved by the appropriate University officials. However, after the authorization to interview the initial three candidates had been signed, the University was informed that the black female candidate had withdrawn her application. The Sociology Department hiring committee – which had previously decided to invite Dr. Grace Marvin (hereinafter "Dr. Marvin"), a white female, for an interview if the black candidate declined – then extended an invitation to Dr. Marvin. (*Ibid.*)

The hiring committee interviewed the three candidates. At the conclusion of the interviews, the committee recommended that Enright be hired. Dr. Marvin was the committee's second choice. The committee's recommendation was forwarded to the appropriate University officials. (*Ibid.*)

The affirmative action committee for the College of Behavioral and Social Sciences questioned whether affirmative action considerations had been given enough priority by the Sociology Department hiring committee in

reviewing the candidates, and whether Dr. Marvin's credentials had been properly evaluated. Pursuant to University procedure, the Dean of the College reviewed the recommendation of the Sociology Department and the considerations raised by the affirmative action committee. The Dean concluded that Enright and Marvin were very close in their qualifications, but he decided to approve the Sociology Department's recommendation to hire Enright, in deference to the Department's wishes. (*Ibid.*)

The ultimate hiring decision at the University, however, is not made by either a department or the college dean. The final choice must be approved by the University Vice-President for Academic Affairs and Provost, who acts as the University President's designee for final approval of all academic hiring decisions made at the University. The Provost is also charged with the responsibility for implementing the University's affirmative action goals and obligations. (CR: 23.)

The Provost reviewed the written comments and recommendations of the departmental hiring committee, the dean, the affirmative action committee and the University's affirmative action officer. After reviewing the academic qualifications of both Drs. Enright and Marvin and considering the affirmative action goals of the University, the Provost determined that the Sociology Department hiring committee had neither accurately evaluated the academic credentials of Dr. Marvin nor adequately considered the University's affirmative action goals and obligations. Given the fact that women were

underutilized in the University's Sociology Department[1], and mindful of the University's affirmative action plan, the Provost was particularly concerned that an opportunity to hire a qualified woman in that department did not go overlooked. (CR: 21, 23.)

The Provost then informed the College Dean that he could not yet approve the recommended hire of Enright. He asked the Dean to discuss his concerns with the hiring committee and to find a resolution to the hiring question informally. The Provost subsequently received a recommendation from the Sociology Department to hire Dr. Marvin, which was approved. (CR: 23.)

B. Summary of Procedural History

On January 26, 1988, Enright filed an amended complaint under Title VII of the Civil Rights Act of 1964, alleging that the University had failed to hire him as Assistant Professor of Sociology because of his sex. (CR: 4.) The University timely filed its answer. (CR: 8.)

On March 17, 1989, the University filed a motion for summary judgment (CR: 19); on March 31, 1989, Enright filed a cross-motion for partial summary judgment (CR: 25). The district court heard oral argument on both motions on August 18, 1989; the district court announced its intended decision on that date as well. (Court Minutes

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[1] As a federal contractor, the University is required to determine the utilization of women and minorities in each of the University departments and to demonstrate efforts to recruit and hire them if they are underutilized with respect to their availability in the relevant labor pool. (CR: 22.)

(August 18, 1989).) The district court's order granting defendant's motion for summary judgment was entered on October 16, 1990. (CR: 47.) Enright filed a timely notice of appeal to the Ninth Circuit Court of Appeals.

The Ninth Circuit heard oral argument in this matter on February 12, 1991, and filed its unpublished opinion on April 26, 1991.[2] Petitioner filed a suggestion that the case be heard *en banc* on May 12, 1991; the suggestion was denied on July 3, 1991.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE UNIVERSITY'S APPLICATION OF ITS AFFIRMATIVE ACTION PLAN WAS VALID UNDER *JOHNSON V. TRANSPORTATION AGENCY*, 480 U.S. 616 (1987).

Enright argues that review of the Ninth Circuit opinion is necessary because of what he claims are two important and unsettled questions of law. Paraphrasing his contentions to the Court, it is plain that Enright contends that the issues in this case are: (1) whether this Court should establish a "bright line" as to what constitutes a "manifest" imbalance under the *Johnson* case; and (2) whether rigid adherence to every aspect of an employer's published personnel policies is required before an employer can rely on its affirmative action plan in

[2] Respondent's request to the Ninth Circuit to publish its opinion was denied on August 8, 1991.

making hiring decisions. Neither of these questions is unsettled, and neither requires the attention of this Court.

A. The *Johnson* Case.

In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), this Court held that an employer's consideration of sex as one factor in a hiring decision is appropriate if done pursuant to an affirmative action plan which is responsive to a "conspicuous imbalance" in a "traditionally segregated job category." (*Id.* at 630.)[3] This Court observed that the effect of such hiring decisions does not improperly trammel the interests of male applicants if sex is but one factor considered. In addition, the *Johnson* decision held that women must compete with all other qualified applicants, that the affirmative action plan must not impose rigid hiring quotas, and that the hiring cannot operate to unseat male incumbents or create an absolute bar to their being hired. (*Id.* at 637-641.) Moreover, the Court noted that if an affirmative action plan is articulated as the basis for an employer's hiring decision, the plaintiff must prove that the plan is invalid and that the employer's justification is a pretext. (*Id.* at 626-627.)

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[3] Enright consistently uses the term "manifest" imbalance to describe the condition which this Court held in the *Johnson* case could be remedied by resort to a valid affirmative action plan. The phrase, which is borrowed from this Court's earlier *Weber* opinion, is used interchangeably with the term "conspicuous" imbalance. Respondent respectfully suggests that a review of the context in which both decisions discuss these terms reveals that both terms were meant to denote a condition in the workplace in which a protected class of individuals is obviously underrepresented. (See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 630-632, *supra*.)

Here, the evidence was irrefutable and uncontroverted that Dr. Marvin, the female sociologist who was hired instead of Enright, was well-qualified for the position and was required to compete with other applicants. In addition, it was uncontroverted by Enright that sex was only one factor in a host of considerations, and that Dr. Marvin's appointment did not dislodge any male professors on the "tenure track".[4] It is also plain that the University's affirmative action plan neither imposes rigid hiring quotas nor creates an absolute bar to male applicants. (See, e.g., CR: 23, Exhibit A, Policy Statement [Section IB, stating that the University is committed to hiring protected class members "when they have been adjudged substantially equal in qualifications to non-protected class members"; Section III, directing that if a protected class is "underutilized",[5] affirmative action goals will be established and affirmative action recruitment and hiring be diligently pursued].)

In his petition to this Court, Enright nevertheless asserts that *Johnson* is inapplicable in this case, arguing that there was an insufficient imbalance in the Sociology

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[4] Enright must concede that he had no "absolute entitlement" to the position (see *Johnson*, 480 U.S. at 638), since it is undisputed that neither the department nor the dean has final hiring authority. That power is vested in the University Vice President for Academic Affairs and Provost, who never exercised the power in Enright's favor. (CR: 23.)

[5] See footnote 1, *supra*.

Department to justify application of the University's affirmative action plan to the disputed hiring process.[6] As both the district court and the Ninth Circuit expressly and appropriately held, Enright's assertions in this regard are not supported by the evidence. Because Enright therefore failed to establish an essential element of his discrimination claim – viz., that the University's affirmative action plan was invalid – the Ninth Circuit properly affirmed the district court's order granting summary judgment in favor of the University. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1985).)

B. The Statistics and Pools Considered by the University Showed "Conspicuous" or "Manifest" Imbalance.

As the *Johnson* case makes clear, the University need not "point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation'" to justify its plan. (*Johnson*, at 630.) Nor is it required that the University prove a disparity sufficient to constitute a prima facie Title VII case. (*Id.* at 632.) To the contrary, *Johnson* specifically holds that " . . . as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking . . . " (*Id.* at 633, n. 11.)

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[6] In his arguments to the district court and the Ninth Circuit, Enright also argued that tenure-track Sociology professorships at the University do not constitute an appropriate "traditionally segregated" job. (See *Johnson*, at 631.) Enright has apparently abandoned this position, as it is not raised in the petition for writ of certiorari.

It is enough to show a "conspicuous" disparity (*Id.* at 630) between the percentage of female incumbents and the percentage of qualified females in the relevant pools. (*Id.* at 632.) Indeed the *Johnson* opinion defines "manifest imbalance" as "reflect[ing] underrepresentation of women and minorities" (*Id.* at 631), a definition expressly relied on by the Ninth Circuit in finding a manifest imbalance in this case. (Petitioner's Appendix, p. 2.)

Such a disparity plainly existed in the instant case, where the percentage of females in the relevant labor pool was substantially more than the percentage of tenured and probationary faculty in defendant's Sociology Department, viz., 18% compared to 34%.[7] In attempting to calculate availability of qualified females for its tenured and probationary positions in the Sociology Department, the University looked to national statistics, and particularly to the percent of females receiving doctoral

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[7] In his petition, Enright states that the "utilization" of females in the University's Sociology Department was 22%. (Petition, p. 12.) The figure expressed in the University's affirmative action plan at the time of the hire in question was 18%. (CR: 23, Exhibit A.) Although the difference is not significant because of the substantial gap that existed between the number of available female sociologists (34%) and the actual number employed by the University, the disparity is explained by the fact that two full-time faculty members began semi-retirement in the 1983-1984 academic year and may have still been considered full-time when the federally-mandated utilization reports were last updated prior to the Enright candidacy. (CR: 20.)

degrees in Sociology during the preceding five years.[8] This was an eminently reasonable approach which satisfies all standards enunciated under *Johnson* and its progeny.[9]

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[8] Enright does not directly challenge the use of national statistics, but implies that this was somehow inappropriate. (Petition, pp.12-13.) However, the undisputed facts show that the University conducted a national search for its assistant professor in the instant case (CR: 28, No. 12); hence, its reliance on national statistics for labor pool comparisons was irrefutably proper. (*Johnson v. Transportation Agency*, 480 U.S. 616, 632, *supra*.)

[9] In another reverse discrimination case (*Higgins v. City of Vallejo*, 823 F.2d 351, 356 (1987)), the Ninth Circuit held that a disparity between the percentage of black residents in the city population (17%) and the percentage of black city employees (7.3%) was significant. In evaluating the hiring decisions of the city's fire department, the *Higgins* opinion pointed out that, until 1964, no blacks had ever been hired and that, between 1964 and 1983, only seven other blacks were hired in that department. (*Ibid.*) The scarcity of females in the University's Sociology Department also existed for a long period of time. (CR:35 [University's Sociology Department had no women prior to 1972, and by 1984, when the position for which Enright competed became available, had only two].) Although the University was not actively discriminating against women during that time period – only two positions became available – it can hardly be said that it was improper to stress affirmative action hiring to remedy the past and current imbalance.

II

THE UNIVERSITY SUBSTANTIALLY FOLLOWED ITS HIRING PROCEDURES AND PROPERLY APPLIED ITS AFFIRMATIVE ACTION PLAN. IN ANY EVENT, THE PROCEDURAL IRREGULARITIES ALLEGED BY ENRIGHT WOULD NOT NULLIFY THE VALIDITY OF THE UNIVERSITY'S DECISION AND ARE NOT DESERVING OF REVIEW BY THIS COURT.

Enright also presents an extensive factual argument in support of his claim that the University is not entitled to rely on its affirmative action plan to justify hiring a female sociologist because it allegedly deviated from its Personnel Policies and Procedures manual. Without setting forth any authority for his contention that the alleged deviations have any legal significance, Enright nonetheless sets out two areas where he claims deviations occurred: (1) the alleged impropriety of the comments made by the College affirmative action committee chair concerning Enright's substantive qualifications; and (2) the University Provost's alleged failure to meet with the Sociology Department's hiring committee after he disapproved their initial recommendation for hire.

The Ninth Circuit held that these minor deviations from personnel procedure were irrelevant because they did not violate the University's affirmative action plan. The integrity of the plan is obviously the only relevant issue; an employer can't rely on an affirmative action plan in support of a proposed hire if the employer fails to follow the plan. The Ninth Circuit determined that the alleged deviations in the hiring procedure did not violate the provisions of the affirmative action plan, a determination supported by the facts presented to the appellate

court and not deserving of this Court's review. The petition for certiorari on this ground should be denied.[10]

CONCLUSION

For the foregoing reasons, respondent California State University respectfully urges that the petition for writ of certiorari should be denied.

DATED: August 26, 1991

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[10] University notes that Enright has not demonstrated that the so-called deviations from the University's hiring procedures amount, in and of themselves, to a deprivation of constitutional dimensions. Although the University recognizes a responsibility to adhere to its written hiring procedures in most cases, there can be no doubt that Enright never possessed any *entitlement* to the assistant professorship in the Sociology Department because the mere recommendation of the departmental hiring committee was only one step in the process. The final decision in all hiring matters rests with the University Provost, a fact which Enright has never controverted. (CR: 23.)